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8 UNITED STATES DISTRICT COURT  
9 EASTERN DISTRICT OF CALIFORNIA

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12 UNITED STATES OF AMERICA,

13 Plaintiff,

14 v.

NO. CR. 89-062 WBS GGH  
CCA No. 09-15319

15 MICHAEL L. MONTALVO,

ORDER DENYING A CERTIFICATE OF  
APPEALABILITY

16 Defendant.  
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20 On January 23, 2009, Michael L. Montalvo filed a notice  
21 of appeal from this court's rulings on his motions dated  
22 September 2, 2008; December 1, 2008; and January 5, 2009.  
23 (Docket Nos. 1050, 1058, 1060.) Upon the Order of Appellate  
24 Commissioner Peter L. Shaw, the court will construe his notice of  
25 appeal as a request for a certificate of appealability ("COA") on  
26 the claims raised in these motions. See United States v. Asrar,  
27 116 F.3d 1268, 1270 (9th Cir. 1997) ("If no express request is  
28 made for a certificate of appealability, the notice of appeal  
shall be deemed to constitute a request for a [COA].").

1           Montalvo's first motion sought relief from the final  
2 judgment of his habeas proceeding pursuant to Federal Rule of  
3 Civil Procedure 60(b), and his subsequent motions sought  
4 reconsideration of the court's denial of that motion. Pursuant  
5 to Lynch v. Blodgett, 999 F.2d 401, 403 (9th Cir. 1993), a COA is  
6 required in order to appeal from the denial of a Rule 60(b)  
7 motion that sought relief from the judgment of a previous habeas  
8 proceeding.

9           In denying Montalvo's Rule 60(b) motion dated September  
10 2, 2008, this court concluded that it did not have the authority  
11 to reverse the Ninth Circuit's decision in United States v.  
12 Montalvo, 331 F.3d 1052 (9th Cir. 2003) (per curiam). Therefore,  
13 because Montalvo's motion "was dismissed on procedural grounds,"  
14 the determination of whether a COA should issue requires  
15 consideration of "two components, one directed at the underlying  
16 constitutional claims and one directed at the district court's  
17 procedural holding." Slack v. McDaniel, 529 U.S. 473, 484-85  
18 (2000).


19           Under Slack, a COA should issue "when the prisoner  
20 shows, at least, that [(1)] jurists of reason would find it  
21 debatable whether the [motion] state[d] a valid claim of the  
22 denial of a constitutional right and that [(2)] jurists of reason  
23 would find it debatable whether the district court was correct in  
24 its procedural ruling." Id. at 484. Each component "is part of  
25 a threshold inquiry, and a court may find that it can dispose of  
26 the application in a fair and prompt manner if it proceeds first  
27 to resolve the issue whose answer is more apparent from the  
28 record and arguments." Id. at 485.

1 The court has reviewed Montalvo's motion dated  
2 September 2, 2008, and concludes that "jurists of reason" would  
3 not "find it debatable" that this court lacked the authority to  
4 declare that the Ninth Circuit did not have jurisdiction to  
5 consider whether the failure to instruct the jury in accordance  
6 with United States v. Richardson, 526 U.S. 813 (1999), was  
7 harmless error. See Montalvo, 331 F.3d at 1056-59.

8 Accordingly, the court will not grant the Certificate  
9 of Appealability. The Clerk of this court is directed to send a  
10 copy of this Order to the Clerk of the United States Court of  
11 Appeals for the Ninth Circuit.

12 IT IS SO ORDERED.

13 DATED: April 1, 2009

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15 WILLIAM B. SHUBB  
16 UNITED STATES DISTRICT JUDGE  
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